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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. SCHILLING, Individually and as COMMISSIONER OF SAVINGS AND LOAN ASSOCIATIONS FOR THE STATE OF ILLINOIS,

Petitioner,

vs.

TELEGRAPH SAVINGS AND LOAN ASSOCIATION OF CHICAGO and the OFFICERS and DIRECTORS thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

NEIL F. HARTIGAN
Attorney General of Illinois
JILL WINE-BANKS
Solicitor General of Illinois
State of Illinois Center
100 West Randolph Street
Twelfth Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Petitioner

MICHAEL J. HAYES *
Director of Advocacy
ROGER P. FLAHAVEN
Assistant Attorney General
Of Counsel

* Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

1. Whether former management of a state chartered savings and loan association lack capacity or standing to represent the institution in litigation without successfully challenging the appointment of the Federal Savings and Loan Insurance Corporation as receiver of the institution?

2. Whether the claims of Respondents are barred by the doctrine of collateral estoppel as a result of decisions reached in their unsuccessful attempt to remove the Federal Savings and Loan Insurance Corporation as receiver of the institution?

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OPINIONS DELIVERED BELOW

1. *Telegraph Savings & Loan Ass'n of Chicago v. Schilling,* 115 Ill.App.3d 331, 450 N.E.2d 798 (1st Dist. 1983) (App. C).

2. *Telegraph Savings & Loan Ass'n of Chicago v. Schilling,* 105 Ill.2d 166, 473 N.E.2d 921 (1984) (App. B).

JURISDICTIONAL GROUNDS

Petitioner seeks review of the opinion of the Supreme Court of Illinois which was issued on November 30, 1984. The petition for rehearing was denied by that court on February 1, 1985. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1257(3).

STATUTES AND REGULATION

12 U.S.C. Section 1464(d)(6)(A).

> The grounds for the appointment of conservator or receiver for an association shall be one or more of the following: (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound condition to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court for the judicial

district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. Such proceedings shall be given precedence over other cases pending in such courts, and shall be in every way expedited. Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

12 U.S.C. Section 1464(d)(6)(C).

Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

12 U.S.C. Section 1729(d).

In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

Ill. Rev. Stat. ch. 17, par. 3191 (1983) [*formerly codified at* Ill. Rev. Stat. ch. 32, par. 848 (1979)].

Sec. 7-8. Commissioner's Authority to take Custody. The Commissioner in his discretion may take custody of the books, records and assets of every kind and character of any association, trust, or association in

liquidation, for any of the purposes hereinafter enumerated, if it appears from reports made to the Commissioner, or from examination made by or on behalf of the Commissioner:

(a) That the directors, officers, trustees, or liquidators have neglected, failed or refused to take any action which the Commissioner may deem necessary for the protection of the association or trust, or have impeded or obstructed an examination; or

(b) That the withdrawable capital of the association is impaired to the extent that the realizable value of its assets is insufficient to pay in full its creditors and holders of its withdrawable capital; or that its permanent reserve capital is impaired; or

(c) That the association is unable to continue operation; or

(d) That the business of the association, trust or association in liquidation is being conducted in a fraudulent, illegal, or unsafe manner; or

(e) That the officers, employees, trustees, or liquidators have continued to assume duties or perform acts without giving bond as required by the provisions of this Act.

Unless the Commissioner finds that an emergency exists which may result in loss to members or creditors and requires that he take custody immediately, he first shall give written notice to the directors, trustees, or liquidators specifying the conditions criticized and state a reasonable time within which correction may be made.

12 CFR Section 569a.4 (1980).

. . . Immediately upon taking possession of any insured institution the Corporation as Receiver shall forthwith take possession of and title to books, records, and assets of every description of such institution and of all offices of such institution. The Cor-

poration as Receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to (a) all the rights, titles, powers and privileges of the insured institution, its members, holders of checking or savings accounts and nonwithdrawable accounts, its officers and directors or any of them, and (b) the titles to the books, records, and assets of every description of any conservator, receiver, or other legal custodian of such institution appointed under State law. Such members, holders of checking or savings accounts and nonwithdrawable accounts, officers or directors, or any of them, or any such conservator, receiver, or other legal custodian shall not thereafter have or exercise any such rights, powers, or privileges or act in connection with any asset or property of any nature of the institution in receivership.

STATEMENT OF THE CASE

On May 22, 1980 petitioner, William J. Schilling, in his capacity as Commissioner of Savings and Loan Associations for the State of Illinois, ("Commissioner") took custody of Telegraph Savings and Loan Association of Chicago ("Telegraph") under Section 7-8 of the Illinois Savings and Loan Act (R. C6-8) [now codified at Ill. Rev. Stat. ch. 17, par. 3191 (1983)]. Telegraph was a state chartered savings and loan association (R. C2).

Soon after the Commissioner's action, the Federal Home Loan Bank Board ("Bank Board") appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver of Telegraph pursuant to 12 U.S.C. Section 1729(c)(2) (R. C60-61). Under that federal receivership, the business

of Telegraph was sold to a federally chartered savings and loan association (R. C61).

Ultimately, three lawsuits were filed to contest these custodial and receivership actions. On June 2, 1980 Telegraph filed two substantially identical lawsuits: one in the Circuit Court of Cook County, Illinois ("*Telegraph I*") and one in the United States District Court for the Northern District of Illinois ("*Telegraph II*"). In both actions, Telegraph sued the Commissioner under Section 7-12 of the Illinois Savings and Loan Act [now codified at Ill. Rev. Stat. ch. 17, par. 3195 (1981)] and the Bank Board and FSLIC under 12 U.S.C. Section 1464(d)(6)(A).

The state court suit was removed to the United States District Court for the Northern District of Illinois by the two federal agencies. On June 12, 1980 the district court dismissed *Telegraph I* for lack of derivative jurisdiction. Further, the district court refused to sever and remand the claims against the Commissioner to state court (R. C51-53).

Also on June 12, 1980 Telegraph and its officers and directors commenced the instant action in the Circuit Court of Cook County, Illinois ("*Telegraph III*") (R. C2). This action was also brought under Section 7-12 of the Illinois Savings and Loan Act (R. C30). The complaint asserts that the Commissioner abused his discretion in making various findings under Section 7-8 of the Illinois Savings and Loan Act [now codified at Ill. Rev. Stat. ch. 17, par. 3191 (1983)]. In Count I, the finding of an emergency is challenged (R. C3). In Count II, the findings that the realizable value of Telegraph's assets was insufficient to pay in full its creditors and holders of its withdrawable capital, that its permanent reserve capital was impaired, and that Telegraph was unable to continue operation are contested (R. C4).

The Commissioner's motion to dismiss was heard on June 30, 1980 (R. 20-31). The case was dismissed on that date for the reasons stated on the record (R. C70).

Respondents appealed from that dismissal order (R. C72). The Appellate Court of Illinois reversed the dismissal order and remanded for further proceedings. *Telegraph Savings & Loan Ass'n of Chicago v. Schilling,* 115 Ill. App.3d 331 (1st Dist. 1983) (App. C). The Supreme Court of Illinois upheld that ruling. *Telegraph Savings & Loan Ass'n of Chicago v. Schilling,* 105 Ill.2d 166 (1984) (App. B).

It must also be noted that Respondents unsuccessfully challenged the appointment of the FSLIC as receiver in *Telegraph II.* The district court first granted partial summary judgment in favor of the Bank Board and FSLIC. *Telegraph Savings & Loan Ass'n v. FSLIC,* 564 F.Supp. 862 (N.D. Ill. 1981) (App. G). After trial of the remaining issues, the district court again ruled against Telegraph and its officers and directors. *Telegraph Savings & Loan Ass'n v. FSLIC,* 564 F.Supp. 880 (N.D. Ill. 1982) (App. F). Thereafter, the district court refused to exercise pendent jurisdiction over the claims against the Commissioner and dismissed them without prejudice. All of the district court orders in *Telegraph I* and *Telegraph II* were upheld. *Telegraph Savings and Loan Ass'n v. Schilling,* 703 F.2d 1019 (7th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 341, 78 L.Ed.2d 681 (1983) (App. E).

The issue of lack of capacity or standing was raised before the state trial court by way of motion to dismiss (R. C18 to R. C21) and in the briefs before the Illinois Appellate Court and Supreme Court of Illinois. While the issue was not reached at the trial or appellate levels, petitioner's argument was rejected by the state Supreme

Court. *Telegraph Savings & Loan Ass'n of Chicago v.* Schilling, 105 Ill.2d 166, 173-75 (1984) (App. B 3-5).

The issue of collateral estoppel was raised for the first time in the Appellate Court of Illinois because the district court decisions which form the basis for petitioner's argument were not rendered until many months after this suit had been dismissed by the state trial court. The Commissioner's argument was unsuccessful before both reviewing courts. *Telegraph Savings & Loan Ass'n of Chicago v. Schilling,* 115 Ill.App.3d 331, 340 (1st Dist. 1983) (App. C-11), *aff'd* 105 Ill.2d 166, 175-78 (1984) (App. B 5-8).

ARGUMENT

I.

LACK OF CAPACITY OR STANDING

The Commissioner maintains that former management of a state chartered savings and loan association lack capacity or standing to represent the institution in litigation without successfully challenging the appointment of the FSLIC as receiver of the institution. The decision of the Supreme Court of Illinois conflicts with various federal court decisions as to this issue. Further, the state court decided an important question of federal law which has not been, but should be settled by this Court.

On May 22, 1980 the Bank Board appointed the FSLIC as receiver of Telegraph pursuant to 12 U.S.C. Section 1729(c)(2) (R. C60-61). An action to contest such an appointment is authorized under 12 U.S.C. Section 1464(d)(6)(A). Such an action is the exclusive remedy to contest that appointment. 12 U.S.C. Section 1464(d)(6)(C).

Further, the receiver's authority to carry on and wind up the business of the institution is founded in 12 U.S.C. Section 1729(d). One of the regulations applicable to the receivership [12 CFR Section 569a.4 (1980)] provides that, by operation of law, the FSLIC succeeds to:

> (a) all the rights, titles, powers and privileges of the insured institution, its members, holders of checking or savings accounts and nonwithdrawable accounts, its officers and directors or any of them, and (b) the titles to the books, records, and assets of every description of any conservator, receiver, or other legal custodian of such institutions appointed under State law.

In addition, with respect to the institution's officers and directors, that regulation provides that they:

> shall not thereafter have or exercise any such rights, powers, or privileges or act in connection with any asset or property of any nature of the institution in receivership.

Thus, upon appointment as receiver, pursuant to federal law, the FSLIC succeeded to all rights, titles, powers and privileges of Telegraph and its officers and directors. The aforementioned regulation divests the officers and directors of such property interests. Accordingly, the Commissioner maintains that respondents lack capacity to prosecute this action because all property interests, including choses in action, have been vested in the FSLIC.

The Commissioner's position has been adopted three times. In *First Savings & Loan Ass'n v. First Federal Savings and Loan Ass'n*, 531 F.Supp. 251 (D. Hawaii 1981), ("*First Savings I*") a state chartered savings and loan association challenged the Bank Board's appointment of the FSLIC as its receiver. The court held that under such circumstances, management cannot make claims for the association once it has been placed in receivership.

First Savings I, 531 F.Supp. at 255-56. Rather, the FSLIC acquired all powers to represent the association in court. *First Savings I*, 531 F.Supp. at 256. Accordingly, other actions brought on behalf of the association fail to state a valid claim. *First Savings I*, 531 F.Supp. at 256.

Second, shareholders brought an action on behalf of the same association against state and federal officials in *First Savings and Loan Ass'n v. First Federal Savings & Loan Ass'n of Hawaii*, 547 F.Supp. 988 (D. Hawaii 1982) ("*First Savings II*"). The court found that by virtue of its appointment as receiver, the FSLIC acquired all of the powers of the association's officers and directors, except for the ability to seek removal of the receiver in federal district court. *First Savings II*, 547 F.Supp. at 994. Further, the court held that only the receiver may institute, prosecute, or maintain any claims on behalf of the association and, therefore, dismissed claims for declaratory, injunctive, and monetary relief. *First Savings II*, 547 F.Supp. at 994-95.

Third, in *Manning Savings and Loan Ass'n v. FSLIC*, No. 83 C 757 (N.D. Ill. Sept. 14, 1983) (App. H), an Illinois chartered savings and loan association challenged the Bank Board's appointment of the FSLIC as its receiver. In that case, plaintiff alleged that the Commissioner acted in violation of Illinois law and deprived plaintiff of property without due process.

The court agreed with the Commissioner's argument that plaintiff's exclusive remedy was an action under 12 U.S.C. Section 1464(d)(6)(A) to remove the receiver, that plaintiff cannot maintain any other claims because all choses in action had been vested in the receiver, and that the indispensable prerequisite to the plaintiff's prosecution of any other claims is an order removing the FSLIC as

receiver. *Manning Savings and Loan Ass'n v. FSLIC*, No. 83 C 757 (N.D. Ill. Sept. 14, 1983) (App. H 4-6). Accordingly, the Commissioner was dismissed as a party defendant.

In summary, the Commissioner maintains that all choses in action with respect to Telegraph have become vested in the FSLIC by operation of federal law. A successful challenge to the receiver's appointment would allow former management to represent the seized institution in litigation. Having unsuccessfully challenged the appointment of FSLIC as Telegraph's receiver, respondents lack capacity or standing to maintain this action.

As demonstrated above, the decision sought to be reviewed conflicts with various federal court decisions on this issue. In addition, the Commissioner maintains that the Supreme Court of Illinois has decided an important federal question which has not been, but ought to be, settled by this Court.

II.

COLLATERAL ESTOPPEL

The Commissioner maintains that the claims of respondents are barred by the doctrine of collateral estoppel as a result of the decisions reached in their unsuccessful attempt to remove the FSLIC as receiver of the institution. Further, the Commissioner submits that the Supreme Court of Illinois failed to give appropriate preclusive effect to those federal court decisions.

It is well established that a federal question reviewable by this Court is necessarily raised when a party asserts that due faith and credit have not been given to a federal court judgment in a state court proceeding. *West Side R.R. Co. v. Pittsburgh Constr. Co.*, 219 U.S. 92, 99 (1911).

Because the Supreme Court of Illinois gave no preclusive effect to the federal court determinations with respect to Telegraph's financial status, the Commissioner maintains that it decided a federal question in a way which conflicts with applicable decisions of this Court.

The factual background of this case was succinctly stated in *Telegraph Savings and Loan Ass'n v. Schilling*, 703 F.2d 1019, 1021 (7th Cir. 1983) (App. E 2-3):

> Telegraph was an Illinois chartered savings and loan association owned by one hundred and twenty stockholders and insured by the FSLIC. In the late 1970's Telegraph began experiencing financial difficulties. As a result of heavy losses, it was unable to satisfy the reserve and net worth minimums required by 12 C.F.R. Section 563.13. When Telegraph's financial condition continued to decline at an ever increasing rate, the state and federal officials charged with regulating savings and loan associations became alarmed. A special meeting was held in October, 1979, to identify the cause of Telegraph's decline and propose some solutions. Telegraph's Board of Directors and representatives of the Commissioner, the FSLIC and the Federal Home Loan Bank Board (FHLBB) attended. At this meeting the Commissioner concluded that undercapitalization was causing Telegraph's shaky financial condition and indicated that, unless this situation was remedied, the state would have to assume custody.
>
> Additional meetings were held in 1979 and 1980 to monitor Telegraph's financial status and to develop a plan for infusing Telegraph with new capital. *Possible mergers were considered but only one concrete plan surfaced.* The Heron Corporation offered to purchase 80% of Telegraph's preferred stock if the FSLIC would finance the purchase with a fifteen-year interest free loan. *The FHLBB vetoed the Heron Proposal.*

> When no other buyers came forward, the Commissioner and federal officials concluded that they had no choice but to take control. A takeover plan was devised whereby the Commissioner would assume custody of Telegraph and FHLBB would immediately appoint the FSLIC receiver. The FSLIC, in turn, would immediately transfer Telegraph's assets to First Federal Savings & Loan Association under a purchase and assumption agreement.
>
> (Emphasis added).

More specific fact findings were made by the district court as to Telegraph's history of financial difficulties.

> . . . . For the six months ending June 30, 1979, the Association suffered losses in excess of $650,000.00 and logged a total loss for 1979 of $237,469.00. Id., Paragraph 3. As of June 30, 1979, Telegraph's net worth was set at $4,806,938.00. Id.; Conover Affid., Ex. 3 (8-26-80). Over the following ten months, Telegraph's net worth steadily declined to an April 30, 1980, level of $449,389. Roy Affid., Paragraphs 3, 4; Conover Affid., Exhs. 2-13. In the month of April 1980 alone, the Association lost over $730,000.00. Conover Affid., Ex. 13. Telegraph's daily operational losses accelerated from $15,500.00 per day in February to $18,700.00 in March to $24,500.00 in April.
>
> . . . .
>
> . . . . On May 19, 1980, Telegraph's comptroller prepared reports projecting losses of over $590,000.00 for the period of May 1 to May 19 and losses of nearly $1 million for the entire month. Conover Affid., Paragraph 3 (8-26-80). These losses, were they actually to occur, would have given Telegraph's a substantial negative net worth by mid-May. It appeared that Telegraph would in fact suffer these losses when, on May 21, 1980, Virgil Seeley, Telegraph's executive vice-president and treasurer, informed the Commissioner that, "Nothing has come to my attention that

> would indicate operating results materially more favorable for May, 1980 than those experienced in April, 1980." Seeley Affid., Paragraph 3 (8-26-80) [*Telegraph Savings and Loan Ass'n v. FSLIC*, 564 F.Supp. 862, 866 (N.D. Ill. 1981)] (App. G 2-4).

Further, the district court found that:

> From July 1, 1979, to April 30, 1980, Telegraph's book net worth steadily declined from nearly $5 million to $450,000.00. The operational losses for April 1980 alone exceeded $734,000.00. On May 19, Telegraph's comptroller made the following projection:
>
> > Based upon review of the book records of Telegraph as of May 19, 1980 and taking into consideration my knowledge of the financial circumstances of Telegraph, I estimate that for the period May 1 through 19, 1980, Telegraph had lost $591,778.29 and I projected that for the entire month of May, Telegraph would lose $938,147.86.
>
> Conover Affid.; Paragraph 3 (8-26-80). On the basis of the projections of Telegraph's own comptroller, Telegraph had a negative book net worth of approximately $142,000.00 on May 19 and of approximately $240,000.00 on May 22. We note that Telegraph's treasurer estimated that, on the basis of April's operating loss, the Association had a negative net worth of $89,000.00 on May 22, 1980. Seeley Affid., Paragraph 15 (8-26-80). [*Telegraph Savings and Loan Ass'n v. FSLIC*, 564 F.Supp. 880, 888-89 (N.D. Ill. 1982)] (App. F-13).

Finally, the district court concluded that the "fair market value of Telegraph's assets, however, was somewhere in the area of negative $30 million." *Telegraph Savings and Loan Ass'n v. FSLIC*, 564 F.Supp. at 889 (App. F-14). Based upon these findings, the Commissioner maintains that the doctrine of collateral estoppel operates as a bar to this action.

In both counts of the complaint in this matter, it is asserted that the Commissioner abused his discretion in making various findings. In Count I, respondents challenge the finding of an emergency (R. C3). In Count II, respondents challenge the findings that the realizable value of Telegraph's assets was insufficient to pay in full its creditors and holders of its withdrawable capital, that its permanent reserve capital was impaired, and that Telegraph was unable to continue operations (R. C4).

The Supreme Court of Illinois ruled that the doctrine of collateral estoppel would not act as a bar to a State court adjudication of the "emergency" issued raised in Count I. *Telegraph Savings & Loan Ass'n v. Schilling*, 105 Ill.2d at 178 (App. B-8). The court, however, did not apply or analyze the doctrine with respect to any of the financial issues raised in Count II.

This Court has held that under the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of law or fact necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153 (1979).

Based upon the aforementioned federal court findings, the Commissioner maintains that his discretion was properly and lawfully exercised. With respect to the finding of an emergency, Telegraph had been notified at least twice by the Commissioner that unless its financial condition stabilized, custody would be imposed. Telegraph had experienced highly accelerating losses. One of Telegraph's chief officers informed the Commissioner on the day before custody was imposed that no relief could be anticipated for the association. Further, the only plan to attempt to salvage Telegraph, the Heron Proposal, was rejected by

the federal regulators on the day custody was imposed. Based upon these findings, the Commissioner maintains that an emergency existed within the meaning of Section 7-8 of the Illinois Savings and Loan Act [now codified at Ill. Rev. Stat. ch. 17, par. 3191 (1983)].

The Commissioner is authorized to act if any of the grounds under Section 7-8 exist. *People ex rel. Barrett v. Logan County Building and Loan Ass'n*, 369 Ill. 518, 528 (1938). Thus, the Commissioner maintains that his findings as to the insufficiency of the realizable value of Telegraph's assets, impairment of capital, and inability to continue operation are entirely supported by the finding that the fair market value of Telegraph's assets was about negative $30 million.

As noted above, the Supreme Court of Illinois gave no preclusive effect to the federal court findings. That ruling raised considerable consternation among the three dissenting justices who noted:

> Curiously, the majority apparently does not believe these findings would be binding or relevant in a State court proceeding aimed at determining Telegraph's financial status. (*Telegraph Savings & Loan Ass'n of Chicago v. Schilling*, 105 Ill.2d at 183) (App. B-13).

The position of the Supreme Court of Illinois necessarily conflicts with decisions of this Court with respect to the doctrine of collateral estoppel.

CONCLUSION

Wherefore, for all of the foregoing reasons, Petitioner, William J. Schilling, individually and as Commissioner of Savings and Loan Associations for the State of Illinois, respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General of Illinois
JILL WINE-BANKS
Solicitor General of Illinois
State of Illinois Center
100 West Randolph Street
Twelfth Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Petitioner

MICHAEL J. HAYES *
Director of Advocacy
ROGER P. FLAHAVEN
Assistant Attorney General
Of Counsel

* Counsel of Record